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September 22, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

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Case Number: TSO-0187

This Decision concerns the eligibility of XXXXXXXXXXXX(hereinafter referred to as "the individual") to hold an access authorization 1/ under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As set forth below, it is my decision, based on the evidence and testimony presented in this proceeding, that the individual's access authorization should not be granted.

I. Background

In June 2002, the individual's employer, a contractor at a Department of Energy (DOE) facility, requested an access authorization for the individual. During a background investigation, the local security office discovered some derogatory information that created a security concern. DOE asked the individual to participate in a Personnel Security Interview (PSI) in order to resolve the information. The PSI resolved some of the information, but security concerns remained.

The local DOE security office issued a Notification Letter to the individual on November 12, 2004. The Notification Letter alleges under 10 C.F.R. § 710.8(f) that the individual has "deliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire or a Questionnaire for Sensitive National Security Positions." It also alleges that the individual "has engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable, or trustworthy, or which furnishes reason to believe that he may be subject to pressure, coercion, exploitation, or duress which may cause him to act contrary to the best interest of the national security." 10 C.F.R. § 710.8(l).

The security concerns in the Notification Letter are based on the following factual allegations. In a Questionnaire for National Security Positions (QNSP) and an Employment Questionnaire, the

1/ Access authorization is defined as an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material. 10 C.F.R. § 710.5(a).

individual falsified significant information regarding a charge of Larceny of Government Property. The Notification Letter also outlined numerous violations of rules and incidents of improper conduct that occurred at a former employer. It further alleges that the individual was served an ex-parte order for reportedly stalking and harassing his former female roommate. Because of these security concerns, the case was referred for administrative review. The individual filed a request for a hearing on the concerns raised in the Notification Letter. DOE transmitted the individual's hearing request to the Office of Hearings and Appeals (OHA), and the OHA Director appointed me as the Hearing Officer in this case.

At the hearing that I convened, the DOE Counsel elected to call two witnesses, both personnel security specialists. The individual testified on his own behalf and elected to call his former supervisor as a witness. The transcript taken at the hearing shall be hereinafter cited as "Tr." Documents that were submitted by the DOE counsel during this proceeding constitute exhibits to the hearing transcript and shall be cited as "Ex."

II. Standard of Review

The Hearing Officer's role in this proceeding is to evaluate the evidence presented by the agency and the individual, and to render a decision based on that evidence. *See* 10 C.F.R. § 710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting or continuation of access authorization will not endanger the common defense and security and is clearly consistent with the national interest. Any doubt as to the individual's access authorization eligibility shall be resolved in favor of national security." 10 C.F.R. § 710.7(a). I have considered the following factors in rendering this decision: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct; the individual's age and maturity at the time of the conduct; the voluntariness of the individual's participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct, the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors. *See* 10 C.F.R. §§ 710.7(c), 710.27(a). The discussion below reflects my application of these factors to the testimony and exhibits presented by both sides in this case.

When reliable information reasonably tends to establish the validity and significance of substantially derogatory information or facts about an individual, a question is created as to the individual's eligibility for an access authorization. 10 C.F.R. § 710.9(a). The individual must then resolve that question by convincing the DOE that granting his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). In the present case, the individual has not convinced me that granting his security clearance would not endanger the common defense and would clearly be in the national interest. The specific findings that I make in support of this determination are discussed below.

III. Findings of Fact

On November 27, 1991, the individual, who served in the military at the time, was apprehended by the military police after one set of AN/PVS-7 night vision goggles and one panoramic telescope were discovered during an inspection in the top drawer of the individual's wall locker. The estimated value of the goggles was \$6,000 to \$7,000 and the value of the telescope was \$5,700. The military conducted an investigation and charged the individual with Larceny of Government Property. He was issued an Article 15 on January 21, 1992. During the course of a PSI conducted on March 25, 2003, the individual stated that he had purchased the items at issue for \$50. When questioned further, the individual stated that when he bought the items, he knew that they were stolen. Military records in the possession of DOE indicate that the items were stolen.

On January 31, 2002, the individual completed an Employment Questionnaire with his current employer, a DOE contractor. The individual answered "No" when asked whether in the last ten years he had been subject to court martial or other disciplinary proceedings under the Uniform Code of Military Justice. Although the ten year reporting requirement fell outside the date of the individual's receipt of the Article 15 for Larceny of Government Property by 10 days, it is DOE's belief that an individual should be fully forthcoming in his response to a question concerning a conviction that occurred only 10 days beyond the reporting requirement. When answering another question on the same form, the individual provided the false answer of "No" when asked, "Have you ever been charged with or convicted of a misdemeanor or felony offense by any law enforcement agency or government authority, regardless of whether the case was dropped, dismissed, you were found not guilty or the record has been expunged?" *See* Notification Letter.

When asked during a March 25, 2003 PSI why he failed to disclose the Article 15 he had received on the QNSP he signed on April 24, 2002, and reaffirmed on August 12, 2002, the individual stated "Because I wasn't sure that would show up on my military record." PSI at 90. In response to further questioning, the individual stated that he was "not concealing it. I just didn't - I'm trying to get employment and I don't know how that's going to be looked upon as far as me getting a job." When asked if he had falsified the QNSP he signed on April 24, 2002, the individual replied "In a manner, yes, I guess." *Id.* at 91-92.

The Notification Letter in this case also outlines a number of other security concerns including the fact that a former employer, a correction facility, terminated the individual in January 2002 because he brought a tape recorder into the facility in violation of the applicable standards of conduct and performance. In particular, the DOE alleges that the individual provided conflicting answers regarding his termination from this facility. The Notification Letter cites a number of other issues relating to improper conduct and rules violations with this former employer. In addition to the improper conduct and rules violations cited with respect to this employer, the Notification Letter states that the individual repeatedly violated rules at his apartment complex during 2000 and 2001 by parking his motorcycle inside his apartment.

Finally, the Notification Letter states that sometime in August 2002, a local county police department served an ex-parte order on the individual who reportedly was stalking and harassing his former female roommate. The ex-parte order was dismissed at the request of the female roommate.

IV. Analysis

A. Security Concerns Cited Under 10 C.F.R. § 710.8(f)

False statements or misrepresentations by an individual in the course of an official inquiry regarding a determination of eligibility for DOE access authorization raise serious issues of honesty, reliability, and trustworthiness. The DOE security program is based on trust, and when an access authorization holder breaches that trust, it is difficult to determine to what extent the individual can be trusted again in the future. *See, e.g., Personnel Security Hearing* (Case No. VSO-0013), 25 DOE ¶ 82,752 at 85,515 (1995) (affirmed by OSA, 1995); *Personnel Security Hearing* (Case No. VSO-0281), 27 DOE ¶ 82,821 at 85,915 (1999), *aff'd*, *Personnel Security Review* (Case No. VSA-0281), 27 DOE ¶ 83,030 (2000) (terminated by OSA, 2000). This security concern applies, however, only to misstatements that are “deliberate” and involve “significant” information. 10 C.F.R. § 710.8(f) (Criterion F). Based on the record before me, I find that the individual deliberately misrepresented significant information on his Employment Questionnaire and his QNSP. Consequently, DOE properly invoked Criterion F in this case.

A finding of derogatory information does not, however, end the evaluation of evidence concerning the individual’s eligibility for access authorization. *See Personnel Security Hearing* (Case No. VSO-0244), 27 DOE ¶ 82,797 (1999) (affirmed by OSA, 1999); *Personnel Security Hearing* (Case No. VSO-0154), 26 DOE ¶ 82,794 (1997), *aff'd*, *Personnel Security Review* (Case No. VSA-0154), 27 DOE ¶ 83,008 (1998) (affirmed by OSA, 1998). Cases involving verified falsifications or misrepresentations are nonetheless difficult to resolve because there are neither experts to opine about what constitutes rehabilitation from lying nor self-help or self-awareness programs to achieve rehabilitation. Therefore, Hearing Officers must look at the statements of an individual, the facts surrounding the misrepresentation or false statement and the individual’s subsequent history in order to assess whether the individual has rehabilitated himself from the falsehood and whether restoring the security clearance would pose a threat to national security. *See Personnel Security Hearing* (Case No. VSO-0327), 27 DOE ¶ 82,844 (2000), *aff'd*, *Personnel Security Review* (Case No. VSA-0327), 28 DOE ¶ 83,005 (2000) (affirmed by OSA, 2000); *Personnel Security Hearing* (Case No. VSO-0418), 28 DOE ¶ 82,795 (2001). In the end, as a Hearing Officer, I must exercise my common sense judgment whether the individual’s access authorization should be granted after considering the applicable factors prescribed in 10 C.F.R. § 710.7(c).

B. Mitigation of Criterion F Concerns

The key issue in this case is whether the individual has brought forward sufficient evidence to demonstrate that he can now be trusted to be consistently honest and truthful with the DOE. In considering this question, I found that the nature of the individual’s misrepresentations was serious. The individual’s lack of candor, described above, concerning certain areas of his life that could

increase his vulnerability to coercion or blackmail raises important security concerns. The DOE must rely on individuals who are granted access authorization to be honest and truthful; this important principle underlies the criterion set forth in 10 C.F.R. § 710.8(f). This principle has been consistently recognized by DOE Hearing Officers. *See, e.g., Personnel Security Hearing* (Case No. VSO-0281), 27 DOE ¶ 82,821 at 85,915 (1999).

As stated earlier, the individual acknowledges that he was untruthful when answering questions on the Employment Questionnaire and the QNSP concerning the Article 15 for Larceny of Government Property. However, when explaining the incident during the hearing, the individual appeared surprised that he had been charged with Larceny of Government Property while in the military. Tr. at 30. He states that after the military found the stolen property in his possession he was placed on a 45-day restriction, but his rank was never reduced nor did he lose any pay as a result of the incident. The individual states “if the military felt that it was such a negative thing, I don’t think they would have gave [sic] me an honorable discharge where I could stay in the military.” *Id.* at 31. During the course of the hearing, DOE Counsel supplemented the record with a document entitled “Record of Proceedings under Article 15, Uniformed Code of Military Justice”, which states that the original judgment on the Article 15 for the individual was for a reduction in rank by two grades and a forfeiture of pay for two months. DOE EX. 13. However, the document indicates that the judgment was suspended.

During the hearing, the individual was asked about his conflicting answers on forms regarding Article 15:

I’m not trying to deceive anybody about anything. I’ve told you about everything negative that happened with me in one form or another, whether it was on the first application or second application. I have it down in other - - other applications beyond this job, I’ve gotten in trouble for night vision goggles. I can’t go back and do all the research and go to all the human resources where I’ve applied for jobs and find a particular application and show you where I put it down, but I have put it down.

Id. at 38.

As stated above, DOE alleges that the individual also gave conflicting answers regarding his termination from his previous employment with a correctional institution. When asked why on one form he said he had been terminated while on another he indicated that he had resigned, the individual explained the following:

I might have said that I was terminated because I took it upon myself to say I was terminated because the job tell [sic] you to resign . . . but you can’t go back to that job. To me that’s just a nice way of saying that I - - I took it upon myself to say that was a nice way of saying you were terminated . . . once I left the [correctional institution], I had a form saying that I could put “resigned” on my next application for employment.

Id. at 56.

After reviewing the evidence in the record and assessing the credibility of the individual's testimony at the hearing, I conclude that the individual has not mitigated the security concerns arising from his falsifications on an Employment Questionnaire, a QNSP and during a PSI. Although the individual now shows some regret for his falsification, I find his explanations for his untruthfulness to be unpersuasive. First, the individual's willingness to conceal information from the DOE in order to obtain employment and to avoid adverse consequences is an action that is simply unacceptable among access authorization holders. *See Personnel Security Hearing*, 25 DOE ¶ 82,752 (1995) (affirmed by OSA, 1995). Second, the individual did not come forward voluntarily to correct the record. He was not forthcoming in his PSI until questioned by the personnel security specialist. In addition, at the time of the falsifications, the individual was old enough to comprehend the serious nature of the questions and the importance of being honest and truthful with the DOE. Although it has been approximately two years since the falsifications were corrected, I find that the misrepresentations still raise serious and unresolved security concerns. Even though I do not find a pattern of falsification, not enough time has passed since his falsifications were uncovered for me to find any mitigation of the charge. *See Personnel Security Hearing*, Case No. VSO-0289, 27 DOE ¶ 82,823 (1999) (19 months since last falsification is insufficient evidence of reformation). Accordingly, I find that the individual has failed to mitigate the security concerns raised by Criterion F.

C. Security Concerns Cited Under 10 CF.R. § 710.8(l); Unusual Conduct

In the present case, the DOE references rules violations and improper conduct as well as the individual's falsifications as security concerns under Criterion L. During the course of the hearing, the individual attempted to explain the various rules violations and improper conduct incidents that occurred at his former employment and at his home. With respect to issues regarding a number of improper conduct incidents relating to his former employment, the individual gave a couple of explanations during the hearing. ^{2/} The individual disagreed with the allegation that he had received written counseling for failure to report for duty in 2001. He states that "I've never had a failure to report to work, any job I've ever had." *Id.* at 57. As for a reprimand he received in 1996 for insubordination by refusing instructions from his supervisor to exit a dining hall, the individual

^{2/} The Notification Letter states that the individual's previous employment at a xxxxxxxxxxxxxxxx was characterized by a number of issues relating to improper conduct: (1) On July 16, 2001, he was given written counseling because he failed to report to duty on July 14, 2001; (2) He was given a Level 1 Reprimand on September 5, 1997, for use of unnecessary force when he sprayed pepper mace at an xxxxxx on September 4, 1997; (3) He received a Level 1 Reprimand on April 18, 1996, for insubordination by refusing instructions from his supervisor to exit the Officer's Dining Room on April 17, 1996 (his appeal of this reprimand was denied); (4) He received written counseling (a) on August 28, 1995 for not turning in his keys on August 25, 1995, before leaving work, and (b) on June 26, 1995 for failing to sign his time card in violation of a March 24, 1995 memorandum issued by the Warden; and (5) He was suspended for one day on October 19, 1994, for having a missing badge (later determined to be lost). Notification Letter Enclosure 1 at 3.

explains that he was working a double shift (16 hours) and went to the dining hall to eat between his shifts. According to the individual, because his supervisor had seen the individual in the dining hall earlier that day the supervisor ordered him to leave. The individual explains that when he was seen earlier he was not eating a meal but rather waiting for his shift to begin. He states that he “wasn’t going to work and not have an opportunity to eat.” Tr. at 58. The individual further explains that he told his supervisor that he would leave once he finished eating. 3/

During the hearing, the individual was questioned about these various rules violations that occurred in the 1990s and his possible problems with authority and following instructions. *Id.* at 59. The individual did not believe he had a problem with authority and indicated that he follows his supervisors’ instructions. *Id.* After providing explanations for most of the rules violations and improper conduct cited in the Notification Letter, the DOE Counsel asked the individual if he has received any reprimands since he has been employed at DOE. *Id.* at 60. The individual admitted to threatening a male co-worker/roommate on the job and receiving a two-day suspension as a result. Finally, the individual denied that he has trouble with following rules, insubordination and anger, but believes that he has matured since these incidents occurred. 4/

Although the individual denies having a problem with following rules or expressing anger, I am not convinced that the individual has mitigated this pattern of behavior. I am particularly concerned that the individual was recently suspended for two days at his current job with DOE after a reprimand, which is a recent fact made known to the personnel security specialists only during the course of the hearing. This suggests that a pattern of improper conduct and problems with following rules and regulations may still exist. We have stated on numerous occasions that conduct involving questionable judgment, unreliability, untrustworthiness, lack of candor, dishonesty, or failure to obey laws and follow rules and regulations raises a concern that the individual may not safeguard classified information. Based on the foregoing, I cannot find that the individual has mitigated the Criterion L concerns at this time.

III. Conclusion

As explained in this Decision, I find that the DOE properly invoked 10 C.F.R. § 710.8(f) and (l). The individual has not presented adequate mitigating factors that would alleviate the legitimate security concerns of the DOE Operations Office. In view of these criteria and the record before me, I find that the individual has not demonstrated that granting his access authorization would not

3/ With regard to the 2002 ex-parte order served on the individual for reportedly stalking and harassing a female roommate, the individual states “she just flat out lied . . . on the ex-parte, saying I backed her up in a corner. Actually, I was backing up in my own house, when she was up in my face, and I called the police.” Tr. at 32.

4/ The individual offered numerous childhood certificates of achievement, an Army Commendation Certificate and an Honorable Discharge Certificate as evidence of his character. *See* Exh. B through I. He also offered the testimony of a former supervisor who stated that the individual is a dependable and responsible employee. Tr. at 51.

endanger the common defense and would be consistent with the national interest. Accordingly, I find that the individual's access authorization should not be granted. The individual may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Kimberly Jenkins-Chapman
Hearing Officer
Office of Hearings and Appeals

Date: September 22, 2005